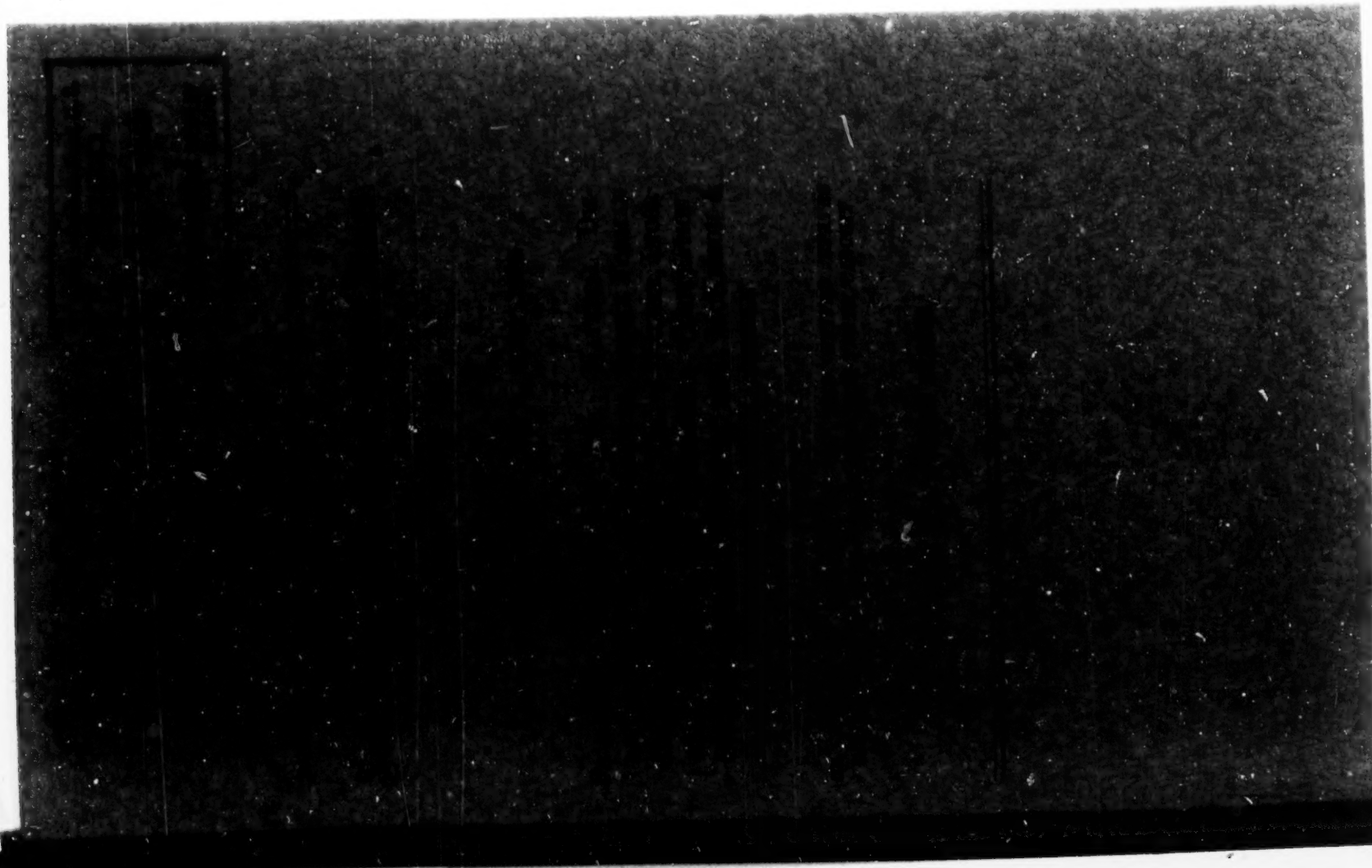

INDEX

CITATIONS

626299 —45—— 1

In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 523–530

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; MCKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 81) is reported in 144 F. (2d) 824. The opinion of the district court (R. 32) is reported in 47 F. Supp. 160.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on August 26, 1944 (R. 108–111).

Petition for a writ of certiorari was filed September 30, 1944, and was granted November 13, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

QUESTIONS PRESENTED

The questions presented by the petitioner are:

(1) Whether a conspiracy by Colorado retailers and wholesalers and out-of-State producers of alcoholic beverages to subject such beverages, when shipped into Colorado from other States, to contracts providing for price maintenance on retail resale within the State is in restraint of interstate commerce, in violation of the Sherman Act.

(2) Whether a boycott by Colorado retailers of certain producers and wholesalers engaged in bringing alcoholic beverages from other States for resale in Colorado is in restraint of interstate commerce, in violation of the Sherman Act.

The respondents will probably present the following additional questions:

(3) Whether any statutes of Colorado have the effect, by force of the Twenty-first Amendment, of making the prohibitions of the Sherman Act inapplicable to the acts with which the respondents are charged.

(4) Whether the indictment fails to specify with sufficient definiteness the offense charged therein.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1, provides in part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, * * *: *Provided further*, That the preceding proviso shall not make lawful

> any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Section 2 of the Twenty-first Amendment to the Federal Constitution provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Pertinent provisions of certain Colorado statutes upon which the respondents may rely by way of defense are set forth in the Appendix, *infra*, pp. 35–37.

STATEMENT

An indictment in two counts returned in the United States District Court for the District of Colorado charged respondents[1] and certain other defendants with violating Section 1 of the Sher-

[1] Of the eight respondents, six are producers of alcoholic beverages located outside of Colorado (R. 3), one is a wholesaler of such beverages doing business in Colorado (R. 3, 4), and one is a Colorado retailer of such beverages (R. 3, 4, 6).

man Act. After demurrers to the indictment and motions to quash had been overruled the Government, having been required to elect between the two counts, elected to stand on the second and the first count was quashed (R. 39–40). The respondents then pleaded *nolo contendere* to the second count and took separate appeals to the court below from the judgments entered against them (R. 42–56).[2] That court reversed the judgments upon the ground that the indictment failed to show that the conspiracy charged in the second count was in restraint of interstate commerce.

The defendants named in the indictment are various producers of alcoholic beverages who ship their product into Colorado from points outside the State, various wholesalers and retailers of these products doing business within the State, an association of such wholesalers, and an association of such retailers (R. 3–7, 12).

The second count of the indictment, prior to the charge of conspiracy, alleges that more than 98% of all spirituous liquors[3] and more than 80%

[2] The Government in the court below did not question, and it is not questioning in this Court, the right of respondents to take appeals, based upon the alleged invalidity of the indictment, from judgments entered upon pleas of *nolo contendere*. See *Edwards* v. *United States*, 312 U. S. 473, 474, 478. Cf. *United States* v. *Norris*, 281 U. S. 619, 621–622; *Hudson* v. *United States*, 272 U. S. 451.

[3] The words "spirituous liquor" are defined for purposes of the indictment as meaning any beverage containing 24% or more of alcohol, by volume (R. 2).

of all wines consumed in Colorado are produced outside the State and that about 1,150,000 gallons of spirituous liquors and about 800,000 gallons of wines are annually shipped into Colorado from other States for consumption in Colorado (R. 8, 12). It alleges that the defendant wholesalers handle more than 75% of the spirituous liquors and wines sold at wholesale in Colorado (*ibid.*). It also alleges that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers outside the State, through wholesalers and retailers, to consumers in the State and that under the laws of Colorado alcoholic beverages shipped and sold in bottles by the producers may be sold to Colorado retailers only by wholesalers licensed as such under the laws of Colorado (R. 7, 12).

The charge of conspiracy in the second count is set forth in paragraphs 30–32 of the indictment. Paragraph 30 charges (R. 12–13) that "all of the defendants" have been engaged since January 1936 in a conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the State by raising, fixing, and stabilizing retail mark-ups and profit margins on such beverages, and that this conspiracy is in restraint of interstate commerce.

Paragraph 31 in part charges (R. 13) that it is and has been a part of this conspiracy:

(a) That the defendants discuss, agree upon, and adopt high and noncompetitive retail prices, mark-ups, and margins of profit (R. 13).

(b) That the defendant retailers and wholesalers agree upon and undertake a program to induce and compel producers and wholesalers to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into the State of Colorado and to establish by said contracts high and arbitrary retail prices embodying the high, arbitrary, and noncompetitive retail mark-ups and margins of profit agreed upon by the defendants (R. 13).

(c) That as a part of this program the defendant association of Colorado retailers prepare and adopt forms of fair trade contracts acceptable to its members and agree with producers and wholesalers upon the forms of such contracts to be used by the latter (R. 13).

(d) That said defendant association circulate among its retail members bulletins listing the names of producers and wholesalers entering into, and the names of those not entering into, fair trade contracts; that the defendant retailers agree to and do patronize only those producers and wholesalers who make such contracts and who compel observance of the minimum retail prices established therein; that the defendant retailers agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into

fair trade contracts embodying the agreed retail prices, mark-ups, and margins of profit (R. 13-14).

(e) That in connection with revisions in the retail prices established by said fair trade contracts, defendant retailers agree with defendant producers and wholesalers as to such revisions as will maintain the agreed retail mark-ups and margins of profit (R. 14).

(f) That the defendant retailers threaten to boycott and do boycott wholesalers and producers who sell their products to retailers who do not observe the retail prices, mark-ups and margins of profit established by the fair trade contracts upon which the defendants have agreed; that to finance these activities defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds thereof to be paid to the defendant association of wholesalers and the defendant association of retailers (R. 14).

Paragraph 32 alleges that the defendants have regularly and continuously carried out the foregoing conspiracy (R. 15).

The indictment alleges that the effect of the defendants' conspiracy has been to fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado, at levels approved by the defendants; to eliminate price competition among defendant retailers in the sale and distribution of such beverages; and

to restrain and suppress interstate commerce in alcoholic beverages not covered by fair trade contracts (R. 15).

Respondents' appeals were considered in the court below by the full bench.[4] The court held that the indictment adequately informed respondents of the essential elements of the offense with which they were charged (R. 88–90). It also held that exercise of State authority over importation of intoxicating liquor into Colorado, pursuant to the Twenty-first Amendment, had not removed the authority of Congress to deal with conspiracies in restraint of such importations (R. 91–92). But the court held the indictment invalid upon the ground that it failed to show that the defendants' conspiracy was in restraint of interstate commerce (R. 93–95). This conclusion appears to rest on two assumptions as to the application of the Sherman Act: (1) that a conspiracy to enter into resale price maintenance agreements covering articles moving in interstate commerce is not in restraint of such commerce if the sales on which prices are

[4] The respondents' appeals, together with appeals involving the validity of two other indictments returned under the Sherman Act, were set down together for rehearing before the full bench and the opinion rendered on rehearing covers all three cases (R. 80–81). The two other cases decided at the same time are *United States* v. *Safeway Stores, Inc.*, certiorari denied, November 6, 1944, and *United States* v. *Kroger Grocery & Baking Co.*, certiorari denied, November 20, 1944.

maintained are intrastate sales[5] and (2) that a conspiracy to boycott the goods of a producer, if carried out by refusing to purchase his goods from his vendees, is not in restraint of the trade between the producer and his vendees.[6]

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding count two of the indictment invalid.

(2) In holding that a conspiracy to subject articles moving in interstate commerce to resale price maintenance contracts is not in restraint of interstate commerce if the sales on which prices are thus maintained are intrastate sales.

(3) In holding that a conspiracy by retailers to boycott producers and wholesalers engaged in shipping alcoholic beverages into Colorado from points outside the State is not in restraint of interstate commerce.

(4) In reversing the judgments of the district court and dismissing the indictment as to respondents.

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[5] The court seemed to think that all allegations of the indictment other than the charge of boycotting were disposed of by the fact that the indictment charged price-fixing only in retail sales and did not charge fixing the prices at which producers sold to wholesalers (R. 93, 94).

[6] The court said that since the law of Colorado does not permit retailers in that State to purchase liquor from out-of-State producers (R. 93), the allegations of the indictment that retailers boycotted producers are "ineffective in charging an offense under the Sherman Act" (R. 94).

SUMMARY OF ARGUMENT

I

The indictment explicitly charges a conspiracy to procure the shipment of alcoholic beverages into Colorado from other States under contracts providing for price maintenance on retail sale of the imported beverages. This conspiracy restrains and tends to suppress the interstate sale and shipment of alcoholic beverages not subject to such contract restrictions. It likewise restrains the competition in interstate commerce of such beverages and it makes interstate commerce the vehicle for price fixing and price maintenance. It has been consistently held that agreements of this kind for the sale of goods in interstate commerce under price maintenance contracts violate the Sherman Act irrespective of whether the resale on which price is maintained is an intrastate or interstate transaction. *United States* v. *Univis Lens Co.*, 316 U. S. 241; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

Since the indictment charges horizontal agreement among producers, among wholesalers, and among retailers, to procure the making of contracts providing for resale price maintenance, the agreement among competing members of these groups and with members of the other groups, as charged in this case, is not within any exemption from Section 1 of the Sherman Act given by the Miller-Tydings Act of August 17, 1937.

II

The indictment charges that, as a part of the conspiracy among producers, wholesalers, and retailers, the defendant retailers agreed to withhold their patronage from producers and from wholesalers who do not enter into contracts providing for price maintenance on retail sale of alcoholic beverages which the producers and wholesalers bring into Colorado from other States. As to the boycotted wholesalers, this conspiracy restrains their interstate trade by narrowing the outlets through which they can sell. Agreements not to deal entered into for the purpose and with the effect of adversely affecting the interstate trade of a person violate the Sherman Act although the agreement not to deal relates to and operates immediately upon transactions which are intrastate. It is, of course, settled that the Sherman Act applies to conspiracies which bring about a restraint of interstate commerce by means of acts which themselves are intrastate. *Local 167* v. *United States*, 291 U. S. 293, 297.

The same considerations govern the conspiracy to boycott certain producers for the purpose of compelling them to carry on interstate trade in the manner desired by the combining group. The fact that in their case the boycott operates upon their product in the hands of their vendees is immaterial. *Loewe* v. *Lawlor*, 208 U. S. 274; *Fashion Originators' Guild, Inc.* v. *Federal Trade*

Commission, 312 U. S. 457. The beverages of the producers all bear brand names and the boycott of their products therefore lost none of its effectiveness by reason of intermediate purchase by Colorado wholesalers.

Since a restraint of interstate commerce is set forth whether or not the interstate movement of imported beverages ended with their delivery to wholesalers in Colorado, it is unnecessary to pass upon the correctness of the ruling below that the interstate movement terminated with such delivery.

III

This Court has held that the Twenty-first Amendment does not deprive the Federal Government of all regulatory power over interstate commerce in intoxicating liquors, and the only question arising under the Amendment is whether the Sherman Act, as here applied, interferes with laws enacted by Colorado to regulate traffic in liquor. But the Fair Trade Act, the Unfair Practices Act, and the Liquor Code of Colorado do not sanction, directly or by implication, conspiracy among competitors to maintain minimum resale prices and profit margins on the retail sale of intoxicating beverages. Condemnation of defendants' conspiracy in fact accords with, rather than conflicts with, the policy of these laws. Nor does the possibility that the present application of the Sherman Act might decrease the State's revenue

626299—45——3

from excise taxes upon intoxicating liquors raise any question under the Twenty-first Amendment. That Amendment confers upon the States no taxing powers in derogation of federal powers granted by the Constitution.

IV

The indictment in this case sets forth the elements of the offense charged in terms which clearly define the scope and character of defendants' conspiracy. Any particularity as to the time, place, or circumstances of the participation of individual defendants in the conspiracy which might be necessary to enable any defendant to meet the charge against him is the proper function of a bill of particulars.

ARGUMENT

I

RESPONDENTS' CONSPIRACY TO SUBJECT TO RESALE PRICE MAINTENANCE AGREEMENTS ALCOHOLIC BEVERAGES SHIPPED INTO COLORADO FROM OTHER STATES IS IN ILLEGAL RESTRAINT OF INTERSTATE COMMERCE

The court below declared that the conspiracy charged in the indictment was "essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado" (R. 93). But assuming that this is a correct characterization of the conspiracy charged, a conspiracy in restraint of interstate commerce is not beyond the scope of the Sherman Act because it

also restrains intrastate commerce. Allegations of restraint of interstate commerce are not to be ignored upon the ground that the parties' primary aim in conspiring to restrain such commerce was to fix, maintain and stabilize prices on intrastate sales.

The indictment in the present case explicitly charges (par. 31 (b), R. 13) that the defendants conspired to procure the shipment of alcoholic beverages into Colorado from other States under price maintenance contracts, i. e., under contracts establishing the prices, mark-ups and profit margins to be charged and exacted by the retailer purchasers of these beverages. This, as we shall presently show, was a conspiracy in restraint of interstate commerce. Moreover, such restraint, if this be material, was a primary objective of the conspiracy. Numerous allegations show this to be a central and essential part of the conspiracy.[7]

A contract under which a producer sells alcoholic beverages to a Colorado wholesaler for shipment into Colorado from the State of production

[7] It is alleged, among other things, that the defendants agreed (1) upon the forms of fair trade contracts embodying the agreed retail mark-ups and profit margins, (2) upon revisions of the terms of such contracts designed to maintain the agreed retail mark-ups and profit margins, (3) upon the circulation among retailers of a white list of producers and wholesalers making such contracts and a black list of those who did not, and (4) upon the boycotting by retailers of producers and wholesalers supplying retailers who do not observe the retail prices, mark-ups and margins of profit established by the contracts (R. 13-14). See *supra*, pp. 6-8.

and the resulting movement into the State of destination are obviously interstate commerce.[8] We submit that it is equally obvious that interstate commerce is restrained by a conspiracy to induce and compel those engaged in such commerce to sell exclusively under contracts providing for fixing and maintaining the price of the product on subsequent resale. Such a conspiracy is directed at preventing the interstate sale and movement of beverages not subject to such contract restrictions and at preventing the competition in commerce of these beverages. Such a conspiracy makes interstate sales and shipments the vehicle for price fixing and price maintenance. It is settled that, apart from the exemptions given by the Miller-Tydings Act, agreements for the sale of goods in interstate commerce under contracts providing for resale price maintenance violate the Sherman Act irrespective of whether the resale on which price is maintained is intrastate or interstate.

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[8] In this connection it is immaterial that regulations issued under the Colorado Liquor Code require that all alcoholic liquor coming into the State for sale therein "be the sole and exclusive property of and subject to the unrestricted power of disposal of a" Colorado wholesaler at the time the liquor crosses the State line (R. 93). The Colorado wholesaler was purchasing in interstate commerce under a price maintenance contract just as much as the producer was selling in interstate commerce under such a contract. Furthermore, mere change of legal title or custody is not the measure of interstate commerce. *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470.

In *United States* v. *Univis Lens Co.*, 316 U. S. 241, the defendants sold multifocal lenses both to wholesalers and to retailers. The contracts with both classes of distributors provided for resale price maintenance. As to retailers at least, the resale on which price was fixed was necessarily intrastate since the retailer was authorized to sell (see pp. 244, 245) only to consumers of the lenses. This Court, in holding that the contracts with retailers, as well as those with wholesalers, violated the Sherman Act, said (pp. 252–253):

> Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act * * * and restrictions imposed by the seller upon resale prices of articles moving in interstate commerce were, until the enactment of the Miller-Tydings Act, 50 Stat. 693, consistently held to be violations of the Sherman Act.

United States v. *Bausch & Lomb Co.*, 321 U. S. 707, likewise held that a conspiracy on the part of those selling in interstate commerce to maintain prices in sales by retailers to ultimate consumers is a conspiracy in restraint of interstate commerce prohibited by the Sherman Act. In that case a company engaged in distributing pink-tinted lenses, which it sold exclusively to wholesalers, combined with them to maintain a distribution system under which the retailers to whom

the wholesalers resold were required to maintain, on sales to consumers, the prices prevailing in the locality in which the retailer was located, and were otherwise limited in their freedom of trade. The district court held that the conspiracy to exercise control over prices and terms in retail sales violated the Sherman Act and enjoined continuance thereof. This Court affirmed the judgment. With reference to the application of the conspiracy to retail sales this Court, after noting that the Soft-Lite appellants had frankly conceded the illegality of this aspect of the conspiracy, said (pp. 719–720):

> Our former decisions compel this conclusion. Price fixing, reasonable or unreasonable, is "unlawful *per se.*" [Citing cases.] The retailer's price to his customer is the single source of stable profits for all handlers.

Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373, and *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, are similar holdings. In the latter case the defendants' jobber licensing system was held illegal under the Sherman Act because the contracts under which the Ethyl Corporation authorized refiners to use and sell its patented fluid provided for control by Ethyl of the prices and business practices of the jobbers to whom the refiners sold. The facts make it clear that most of the jobbers whose sales prices and

practices were thus controlled sold exclusively in intrastate commerce.[9]

Certain respondents, in opposing certiorari in the present case, urged that the *Univis, Dr. Miles Medical,* and *Ethyl* cases are to be distinguished from the present one upon the ground that they involved "comprehensive systems of price maintenance initiated by a producer" and upon the ground that they covered "both wholesale and retail transactions, affecting interstate as well as intrastate sales" (Brief on behalf of Frankfort Distilleries, Inc., et al., p. 7). We submit that the suggested grounds of distinction are without substance. In an agreement to sell in interstate commerce under price maintenance contracts, the restraint and its application to interstate commerce are the same whether the agreement is initiated by the producer or by vendees of the product. The cited decisions are also not distinguishable upon the ground that the conspiracies in those cases were more "comprehensive." In the first place, the illegality of a conspiracy in restraint of interstate commerce is not dependent upon the quantum of commerce subjected to restraint (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, n. 59 at p. 225) and, in the second place, the trade restrained in the present case is certainly more

[9] Since there were some 11,000 licensed jobbers, most of them must have served only retail service stations located in the State of the supplying jobber.

comprehensive than that subjected to restraint in the *Univis* case.[10] As to respondents' assumption that their conspiracy did not cover wholesale transactions or affect interstate sales, it should be noted that the conspiracy affected the "interstate sales" from producers to Colorado wholesalers and covered "wholesale transactions", it being a part of the conspiracy that the Colorado wholesalers sell under contracts providing for price maintenance on retail sales. The indictment specifically alleges that an effect of the conspiracy was "to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts" (R. 15).

The reason why interstate commerce is illegally restrained by a conspiracy to induce or compel the interstate shipment of goods under contracts fixing or maintaining prices on resale of the goods at retail within the State of destination is well stated in *United States* v. *Food & Grocery Bureau of So. Cal.*, 43 F. Supp. 966, 972 (S. D. Calif.), affirmed 139 F. (2d) 973 (C. C. A. 9):

[10] Respondents' conspiracy covered every type and brand of alcoholic beverage shipped into the State of Colorado (*supra*, p. 7) whereas the *Univis* combination covered only the output of a single manufacturer of multifocal lenses. And in the present case the conspiracy applied to trade amounting annually to over 1,000,000 gallons of spirituous liquors and some 800,000 gallons of wines (*supra*, p. 6), a trade patently of a value far in excess of the $1,000,000 annual sales volume of the *Univis* defendants (316 U. S. 241, 246).

> But prices fixed in advance to affect a product at the end of its interstate journey are an interference with that commerce, although, at the time the sale is actually made, the product originating in interstate commerce may actually have come to rest on the shelf of a retailer. It is the agreement on the price, *in advance,* which constitutes the violation, not the sale at the price.

See also *California Retail Grocers and M. Ass'n.* v. *United States,* 139 F. (2d) 978, 983 (C. C. A. 9), certiorari denied, 322 U. S. 729. Compare *Interstate Circuit, Inc.*, v. *United States*, 306 U. S. 208; *United States* v. *General Motors Corp.*, 121 F. (2d) 367 (C. C. A. 7), certiorari denied, 314 U. S. 618, 707.

Respondents are not within any exemption given by the Miller-Tydings Act of August 17, 1937. That act amended Section 1 of the Sherman Act so as to exclude therefrom resale price maintenance contracts valid under the law of the State of resale, but the amendatory act provides (*supra*, pp. 3–4) that it shall not legalize agreements for such contracts entered into between producers, or between wholesalers, or between retailers. The present indictment charges that large groups of producers, of wholesalers, and of retailers, engaged in a common conspiracy to procure the making of resale maintenance price contracts. Agreement between producers, between wholesalers, and between retailers, for the making of

such contracts, therefore stands admitted on the pleadings. In addition, the indictment specifically charges agreement by the retailers with one another to bring about and enforce a system of selling under resale price maintenance contracts.[11]

Defense under the Miller-Tydings Act was pressed in the court below, but that court evidently considered the defense as plainly without merit. Its opinion does not make even a passing reference to the question.

II

THE ALLEGATION THAT, AS A PART OF RESPONDENTS' CONSPIRACY, THE DEFENDANT RETAILERS BOYCOTTED WHOLESALERS AND PRODUCERS WHO DID NOT ENTER INTO OR ENFORCE RESALE PRICE CONTRACTS AS TO THE ALCOHOLIC BEVERAGES WHICH THEY SHIPPED INTO COLORADO FROM OTHER STATES, SETS FORTH A CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE

The indictment charges that it is a part of the conspiracy for defendant retailers to withhold their patronage from producers and wholesalers, engaged in shipping alcoholic beverages into Colorado from other States, who do not enter into contracts providing for maintenance of the agreed retail prices and profit margins (par. 31 (d), R. 13–14), and for defendant retailers to boycott producers and wholesalers, engaged in such ship-

[11] See particularly paragraphs 31 (c), 31 (d), and 31 (f), R. 13, 14.

ments, who supply retailers not observing the agreed retail prices and profit margins (par. 31 (f), R. 14).

As to the conspiracy to boycott wholesalers, we submit that a restraint of interstate commerce is plainly set forth. It narrows the outlets to which the boycotted wholesalers can sell and has "both as its necessary tendency and as its purpose and effect the direct suppression of" interstate purchases by the boycotted wholesalers. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465. The purpose and effect are to bring economic pressure upon the boycotted wholesalers in order to induce them to conduct their interstate business in the manner desired by the combining group. Since the restraint operates and is intended to operate upon interstate commerce, it is immaterial whether the sales from wholesalers to retailers are in interstate or intrastate commerce. The effect on interstate commerce is similar to that resulting when members of a labor union, in order to bring economic pressure to bear on a manufacturer selling his product outside the State of manufacture, agree to refuse to work for purchasers of the product or agree to refuse to do work upon the product in the hands of purchasers. Such combinations restrain interstate commerce although the restraint is effected by intrastate acts. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut*

Stone Co. v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37.[12]

Local 167 v. *United States*, 291 U. S. 293, is likewise pertinent. In that case live poultry shipped to New York City from various States was delivered at railroad terminals to commission men, called receivers, who sold on the spot to wholesalers, called marketmen, who then trucked the poultry to their places of business and sold it to retailers. The wholesalers and two labor unions cooperating with them conspired to fix prices at which wholesalers sold to retailers and to allocate retailers among the wholesalers. This Court, in rejecting the defense that the conspiracy operated upon commerce in poultry after the interstate movement had ended and therefore did not violate the Sherman Act, said (p. 297):

> It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. [Citing cases.] But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices * * * in the State of destination where the interstate movement ends may operate directly to restrain and monopolize inter-

[12] Whatever be the view as to the immunity now given to such combinations by the Clayton Act, this does not impair the authority of the decisions upon the question whether the combinations were in restraint of interstate commerce.

> state commerce. [Citing cases.] The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions.

We also submit that the allegation that defendant retailers, pursuant to conspiracy among all the defendants, boycotted producers who did not enter into fair trade contracts as to the alcoholic beverages which they sold for shipment into Colorado from other States, likewise sets forth a conspiracy in restraint of interstate commerce. The court below was of the opinion that this allegation must be disregarded because the laws of Colorado do not permit Colorado retailers to purchase alcoholic beverages from out-of-State producers. But it is settled that a conspiracy to boycott a manufacturer or a producer, by agreeing not to purchase his product from his vendees, may be in restraint of the producer's interstate trade. *Loewe* v. *Lawlor*, 208 U. S. 274. The complaint in that case, which was held to set forth a violation of the Sherman Act, alleged that the plaintiff manufacturer distributed its hats in interstate commerce by selling them to wholesalers and that the defendants conspired to injure its trade by boycotting its wholesale dealers and the latters' customers.[13]

[13] See paragraphs 5, 20, and 21 of complaint, set forth in a note to the Court's opinion (208 U. S. 274, at pp. 285, 291–296).

In *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, the Guild members, for the purpose of preventing the sale of garments copied from designs which Guild members had originated, agreed not to sell their own goods to retail stores which had purchased garments copied from their designs. This Court held the combination illegal under the Sherman Act although, just as in the present case, there were no direct dealings between the boycotting group and the producers against whom the boycott was directed.

As stated by respondent Schenley Distillers Corp. in its brief opposing certiorari (p. 5), the alcoholic beverages to which respondents' conspiracy relates bear the trademark, brand, and name of the producer.[14] The beverages of any producer could therefore be readily identified and boycotted following their sale to a wholesaler.

The direct and necessary effect of a boycott by retailers of producers (and of wholesalers) who do not sell under fair trade contracts is to restrain or suppress their interstate trade since their

[14] Regulations issued pursuant to authority conferred by the Federal Alcohol Administration Act (27 U. S. C. 205 (e)) provide that all domestic distilled spirits shipped in bottle in interstate commerce must bear a label giving the brand name and the distiller's name (Regulations No. 5, Art. III, of Federal Alcohol Administration). Similarly, all domestic wine shipped in containers in interstate commerce must bear a label giving the brand name and the name of the bottler or packer (Regulations No. 4, Art. III, of Federal Alcohol Administration).

market in Colorado is restricted when Colorado retailers refuse to buy their product or their goods. Where restraint of interstate trade in a commodity is "the necessary and direct consequences" of the acts charged against the defendants in a Sherman Act indictment, no "allegation of a specific intent to restrain such trade" is necessary. *United States* v. *Patten*, 226 U. S. 525, 543.

Since the retailers' boycott restrained the trade of both producers and wholesalers engaged in bringing goods into Colorado from other States, it is immaterial whether the sales from wholesalers to retailers are in interstate or intrastate commerce, and it is unnecessary to consider the application to that question of decisions such as *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, interpreting a statute which is confined to acts "in" interstate commerce. It should, however, be noted that the court below based its holding that sales from wholesalers to retailers are intrastate transactions upon a factual assumption for which the indictment furnishes no support, this assumption being that liquor which a wholesaler brings into Colorado is placed in his warehouse and commingled with his other merchandise before disposition to the retailer (R. 94). Certainly the fact that the wholesaler takes delivery of liquor brought into the State does not show that the interstate movement has terminated. *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 309; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 569–570.

III

THE APPLICATION OF THE SHERMAN ACT TO THE RESPONDENTS IS NOT INVALIDATED BY THE TWENTY-FIRST AMENDMENT OR THE STATUTES OF COLORADO DERIVING SANCTION FROM THE TWENTY-FIRST AMENDMENT

Respondents in the court below urged that the Twenty-first Amendment vests in the States exclusive authority over commerce in intoxicating beverages and deprives Congress, as to them, of all power of regulation derived from the commerce clause. We submit that the contention is without merit and that it has been pointedly rejected by this Court. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, an attack upon the constitutionality of the Federal Alcohol Administration Act, based upon the foregoing interpretation of the Twenty-first Amendment, was held to be so lacking in substance that a three-judge district court provided for by the Act of August 24, 1937, 50 Stat. 751, to hear suits attacking the constitutionality of a federal statute was without jurisdiction to entertain the suit. In *Arrow Distilleries, Inc.*, v. *Alexander*, 109 F. (2d) 397, 400 (C. C. A. 7), the constitutionality of the Federal Alcohol Administration Act was sustained against attack upon this same ground and this Court denied a petition for certiorari (310 U. S. 646) which assigned the constitutional question as a reason for granting the writ.

Decisions by this Court dealing with the effect of the Twenty-first Amendment on State legislation have upheld the right of the States to exercise their police powers to the fullest extent to control traffic in liquor within their borders and have upheld State action restricting imports into or exports from a State although the restrictions might, but for the Amendment, constitute an invalid encroachment upon the commerce power of Congress.[15] But none of the cases has suggested that the Amendment divests the Federal Government of all independent power to regulate interstate commerce in intoxicating liquors and neither the language nor the history of the Amendment gives any support to this view.

If the Sherman Act as applied in the present case conflicted with legislation of Colorado deriving sanction from the Twenty-first Amendment a constitutional question of Federal or State supremacy would be presented for determination. We submit, however, that there is no such conflict in this case.

Before considering the question of possible conflict as it arises here, we call attention to the holding in *Washington Brewers Institute* v. *United States*, 137 F. (2d) 964 (C. C. A. 9), certiorari denied, 320 U. S. 776, that a Sherman

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[15] *State Board* v. *Young's Market Co.*, 299 U. S. 59; *Mahoney* v. *Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U. S. 391; *Finch & Co.* v. *McKittrick*, 305 U. S. 395; *Ziffrin, Inc.*, v. *Reeves*, 308 U. S. 132.

Act indictment charging certain brewing companies with fixing the sales prices of beer in California, Idaho, Oregon, and Washington did not involve an application of the Sherman Act incompatible with the policy embodied in the liquor-control legislation of the States in question. One of the requirements of the California legislation was that the importer, wholesaler, and manufacturer publicly post its beer prices and adhere to its posted prices. Highly restrictive legislation regulating traffic in beer had been adopted by the other three States. The court, in holding that prohibition of the brewers' combination under the provisions of the Sherman Act did not interfere with the enforcement of State regulatory laws, said (p. 968):

> The state laws regulatory of the traffic in malt liquors are directed toward individual conduct. Obedience to them is not rendered difficult or impracticable by the enforcement of a federal statute declaring price-fixing combinations unlawful. In arriving at prices to be charged for their commodity brewers are not required by the states to act otherwise than as free agents, nor are they expected to confederate together with the design of suppressing legitimate competition in respect either of quality or of price.

A brief review of the Colorado legislation relied on by respondents will show that it does not sanction, directly or by implication, the kind of

confederation among competitors for price maintenance and price control charged in this case.[16]

The Colorado Fair Trade Act (*infra*, pp. 35–36) makes it lawful, under certain conditions, to incorporate in a sales contract the requirement that the buyer will not resell, and that he will require a purchaser from him not to resell, at less than the minimum price stipulated by the seller. But, like the Miller-Tydings Act, the statute expressly provides (Sec. 2) that it does not apply to horizontal agreements among producers, among wholesalers, or among retailers, "as to sale or resale prices". Since the present indictment charges such horizontal agreement among competitors (*supra*, pp. 21–22), the acts charged fall outside of the provisions and policy of the Colorado Fair Trade Act.

Respondents' conspiracy is equally not within Section 17 (t) of the Colorado Liquor Code (*infra*, p. 37). This section does not extend the scope of the Fair Trade Act; the section merely gives enforceability to resale prices for alcoholic beverages established in contracts entered into under the Colorado Fair Trade Act.

The Colorado Unfair Practices Act (Sec. 3, *infra*, pp. 36–37) makes it unlawful to sell goods

[16] In a decision rendered prior to the enactment of the legislation in question, the Colorado Court of Appeals held such a combination unlawful under the Colorado common law. *Denver Jobbers' Assn.* v. *The People*, 21 Col. App. 326 (1912).

below cost "for the purpose of injuring competitors and destroying competition". Section 12 of the Act (*infra*, p. 37) declares that its purpose is "to safeguard the public against * * * monopolies and to foster and encourage competition" and it has been declared not to be "a price-fixing law" (*Dikeou* v. *Food Distributors Ass'n.*, 107 Colo. 38, 50). The practices which it condemns are obviously far removed from anything charged against respondents. Sale of alcoholic beverages other than under price maintenance contracts cannot be assumed to be synonymous with sale below cost. The declared purposes of the legislation are not only not in conflict with, but they bear a close affinity to, those of the Sherman Act.

The brief of the Attorney General of Colorado filed in opposition to certiorari emphasizes (1) the importance of the State excise taxes on liquor as a source of revenue and (2) the part played by licensed wholesalers in collecting these taxes. The brief does not suggest that exercise of federal power to strike down or punish respondents' conspiracy would in any way interfere with the State system of collecting excise taxes through wholesalers. The Attorney General did suggest in the court below that "unrestricted wholesale competition" would encourage the bootlegger and decrease State revenues (see *Schenley* brief in opposition to certiorari, p. 15). We had supposed that it was high rather than low prices which "tilled and fertilized" the soil from which the

bootlegger springs, but irrespective of this consideration the Twenty-first Amendment confers upon the States no taxing powers in curtailment of otherwise existing federal power.

IV

THE INDICTMENT ADEQUATELY SPECIFIES THE OFFENSE CHARGED AGAINST RESPONDENTS

We submit that our prior statement of the allegations of the indictment (*supra*, pp. 5–9) shows that it sets forth "the elements of the offense intended to be charged" and apprises the defendants of the accusation, as distinguished from the evidence, which they must be prepared to meet. *Hagner* v. *United States*, 285 U. S. 427, 431. Various specified acts and agreements constituting part of defendants' conspiracy and the nature of the participation therein by each of the three groups of defendants, producers, wholesalers, and retailers, are alleged. The indictment does not, nor should it properly, plead evidentiary facts such as the circumstances or character of each individual defendant's participation in the conspiracy. Any further "particularity of time, place, circumstances," of this nature, if necessary in order to enable any defendant to prepare his defense, falls within the scope of a bill of particulars. *Glasser* v. *United States*, 315 U. S. 60, 66.

The full bench of the Tenth Circuit in a rehearing of the question whether the offense was adequately specified, as this question arose both in

the present case and in two other cases of indictments under the Sherman Act, sustained (one judge dissenting) the validity in this respect of each of the three indictments.[17] Two recent decisions of the Circuit Court of Appeals for the Fifth Circuit involving Sherman Act indictments in which the offense was set forth with at least as much generality as in the present indictment sustained the indictments against the charge that they were fatally indefinite. *United States* v. *N. Y. Great Atlantic & Pacific Tea Co.*, 137 F. (2d) 459, certiorari denied, 320 U. S. 783; *United States* v. *Tarpon Springs Sponge Exchange*, 142 F. (2d) 125.

CONCLUSION

It is respectfully submitted that the judgments of the court below should be reversed, with directions to affirm the judgments of conviction entered by the district court.

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JANUARY 1945.

[17] The other two indictments were held valid in all respects and this Court has denied writs of certiorari. *Safeway Stores, Inc.*, v. *United States* (No. 481), certiorari denied, November 6, 1944; *Kroger Grocery & Baking Co.* v. *United States* (No. 557), certiorari denied, November 20, 1944.

APPENDIX

Colorado Fair Trade Act[1]

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

* * * * *

Section 2. This Act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

* * * * *

Section 4. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act,

[1] 1937 Session Laws, Chapter 146.

whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

COLORADO UNFAIR PRACTICES ACT[2]

SECTION 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 11 of this act for any such act.

(a) The term "cost" * * * as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equip-

[2] 1941 Session Laws, Chapter 227, amending and reenacting 1937 Session Laws, Chapter 261.

ment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising.

* * * * *

SECTION 12. The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

COLORADO LIQUOR CODE

* * * * *

SECTION 17. It shall be unlawful for any person:

* * * * *

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937.

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[1] Colorado Statutes Annotated, 1935, Chapter 89, as amended by 1941 Session Laws, Chapter 160.